No. 12967

# United States Court of Appeals

FOR THE NINTH CIRCUIT

LUCY K. WARD, Next Friend of Hattie Kulamanu Ward, and LUCY K. WARD and KATHLEEN WARD,

*Appellants,*

vs.

LANI W. BOOTH and MELLIE E. HUSTACE and HAWAIIAN TRUST COMPANY, LIMITED, in Its Corporate Capacity and as Guardian of the Estate of Hattie Kulamanu Ward,

*Appellees.*

**Appeal from the Supreme Court of the Territory of Hawaii**

## APPELLANTS' REPLY BRIEF



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### JURISDICTION

Under Section 1293 of Title 28 of the U. S. Code, this Court has jurisdiction to hear appeals from the Supreme Court of the Territory of Hawaii in all cases involving the Constitution, laws or treaties of the United States, or any authority exercised thereunder. In addition, it has complete appellate authority in all other civil cases where the value in controversy exceeds $5,000.00.

It is appellants' contention that this record shows abuses of discretion and erroneous statutory constructions of such magnitude that they amount to a denial to appellants of

due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. It is likewise asserted that there has been a denial of a jury trial guaranteed by the Seventh Amendment to the Constitution.

If, however, this Court does not agree, this Court has power to correct manifest errors of law and abuses of discretion even though no infringement of constitutional rights is shown.

This case involves more than an appeal from a decree of the Supreme Court appointing a guardian of the estate of an alleged incompetent, as appellees assert. It likewise involves an appeal from a decision of the circuit court at chambers, affirmed by the Supreme Court, denying without hearing on the merits a motion to vacate the order appointing the guardian and for the removal of the appointed guardian. Serious questions of fact were put in issue by the denial by the appellees of the facts alleged in the verified motion to vacate the appointment of the guardian, or to remove the guardian (R. 31-47), but the motion was summarily dismissed.

## COMMENTS ON APPELLEES' STATEMENT OF THE CASE

Appellees' statement of the facts are distorted by omission.

The petition for the appointment of a guardian of Hattie Kulamanu Ward alleged, as is required by the statute of the Territory of Hawaii, that Hattie Kulamanu Ward was *non compos,* and that as a result thereof, she was incompetent to care for her property. A person must, under Sections 12508 and 12509, Revised Laws of Hawaii, 1945, be *non compos* before a guardian can be appointed. (These sections are set forth in Appellants' Opening Brief, page 16, and Appellees' Reply Brief, Appendix, pages ii and iii.)

The only indication that notice was served upon Hattie Kulamanu Ward—who never appeared in the proceedings—

is the sheriff's return (R. 25). No finding of notice was made by the probate judge. Without the appearance of Hattie Kulamanu Ward or any showing of the reason for her non-appearance, the probate judge appointed a guardian *ad litem* for her although she was then, under the law of the Territory, presumed to be sane.

On December 28, 1948, at the request of the guardian *ad litem,* the matter was continued for hearing until January 20, 1949 (R. 116-117). Without any explanation appearing therefor in the record, the hearing on the petition was advanced and held on January 13, 1949. Lucy K. Ward, as a sister and intervenor, appeared by Wendell Carlsmith, Esq., of Carlsmith and Carlsmith, at the hearing on January 13, 1949, and Kathleen Ward, as a sister and intervenor, appeared by Attorney Cass (R. 117-118). During the course of the hearing, however, after Attorney Carlsmith stated he had no objections to the appointment of the Hawaiian Trust Company, Limited, Attorney Cass undertook to speak for both Lucy K. Ward and Kathleen Ward, as sisters and intervenors (R. 137) and to oppose the appointment of the appellee Trust Company as guardian. Lucy K. Ward, however, appears here not only on behalf of herself but also as next friend of her sister Hattie Kulamanu Ward. Appellees choose to ignore the legal distinction between these two capacities.

In the motion to vacate the appointment of the guardian or for rehearing and removal of the guardian, an offer of proof was made by Lucy K. Ward that her attorney had disobeyed her instructions at the hearing held on the petition on January 13, 1949 (R. 160). This fact is ignored by appellees as well as by the courts below.

It is questionable as a matter of law, as appellees assert, whether the testimony of Mrs. Booth, as it was given before Judge Cristy in the hearing on the guardianship proceeding (R. 119-130) or as it is summarized in appellees' brief,

page 3, establishes that Hattie Kulamanu Ward was *non compos.* It is doubtful if Dr. Kepner's report establishes that Hattie Kulamanu Ward was *non compos.* The court made no finding, as required by Section 12509, that Hattie Kulamanu Ward was insane (R. 131-132).

Even if the conduct of counsel for Lucy K. Ward or Kathleen Ward constituted a waiver on their behalf of further evidence on the issue of competency, such waiver does not affect the right of the alleged incompetent, Hattie Kulamanu Ward, who here appears by Lucy K. Ward, her next friend, or constitute a waiver on her part.

Appellees foreshorten the testimony in reporting that the guardian *ad litem,* after investigation, believed the Hawaiian Trust Company, Limited was best qualified to serve as guardian by omitting the following admission:

> The Court: Did you ascertain as to whether or not there were any conflicting interests in the Hawaiian Trust Company?
>
> Mr. Collins: I did, your Honor, and the result of my investigation was that conflicting interests would arise principally because of the fact that the property owned by the corporation would be property that might be leased to interests which the Hawaiian Trust Company might otherwise represent. But, as far as I can ascertain, that is the sole conflicting reason that appears. That factor was balanced against the other factors on other trust companies, and it was felt that even with that element present that they would be a satisfactory trustee. It would be more satisfactory than other trustees that would be qualified. (R. 140)

The probate judge's conclusion that the interests of the sisters of Hattie Kulamanu Ward, Lucy K. Ward and Kathleen Ward would naturally be conflicting is not based upon any fact or circumstance appearing in the record. If the probate judge had been fully advised of the facts, he would have known that the largest proportion of the ward's estate

was owned jointly with the sisters, Lucy K. Ward and Kathleen Ward, so that their interests, to that extent, were identical.

The probate judge illogically appointed, over the opposition of these two sisters with joint interests, a trust company known to him to be unsatisfactory to them and nominated by sisters with no joint interests with the alleged incompetent.

The motion of Lucy K. Ward, next friend of Hattie Kulamanu Ward, to vacate the order appointing the guardian or for rehearing and to remove the guardian is set forth in the record at pages 31 through 47.

A denial of the verified allegations of this motion was made in the return to the order to show cause by appellees. Thus issues of fact for determination were framed, but left unresolved by the probate judge's refusal to hear the evidence offered by appellants.

The *ex parte* order appointing Lucy K. Ward next friend of Hattie Kulamanu Ward, and the temporary restraining order, were applied for and a showing made to the court of a necessity of an *ex parte* order in accordance with territorial law. The matter was presented to Judge Moore in the absence of Judge Cristy and was made returnable before Judge Cristy on March 16, 1949 (R. 48-49).

On the return day of Lucy K. Ward's motion as next friend of Hattie Kulamanu Ward, an offer of proof was made of evidence showing that Hattie Kulamanu Ward had been examined by a competent alienist other than the alienist whom the guardian *ad litem* had employed, and that this alienist had reached the conclusion that Hattie Kulamanu Ward was competent to determine whom she wished to handle and to represent her in the management of her affairs, although she needed help in the management of her affairs (R. 153).

Where evidence of this kind has been produced many

courts have refused to appoint a guardian. See, for example, *Appeal of John Royston,* 53 Wisc. 612, 624; *In Re Bryden's Estate,* (Pa.) 61 A. 250; *Denner v. Beyer,* (Pa.) 42 A. 2d 747; *In Re Gottsman,* 48 A. 2d 800; *In Re Wiesenberg,* 3 N.Y.S. 2d 745; and *In Re Walter's Estate,* 208 P. 2d 713.

Under the Hawaiian statute and under general construction of similar statutes in other jurisdictions, the offer of proof was sufficient to require the probate judge to reopen the hearings on the issue of competency if justice were to be done to Hattie Kulamanu Ward.

The verified motion alleged that a full and complete hearing to determine the degree of competency of Hattie Kulamanu Ward and the necessity and desirability of appointing a guardian for her had not been had and asked the court to reopen the hearing for the taking of further testimony on the issue of competency. The verified motion was supplemented by the specific offers of proof made at the hearing to show Hattie Kulamanu Ward competent to manage her property with the assistance of agents selected by her, and competent to select suitable agents (R. 44-45).

Appellees abstract portions of statements of counsel before Judge Cristy which, when wrested from context, say the opposite of the portion quoted. Thus, while counsel stated, as indicated by appellees, at page 7 of their brief:

> I cannot say to your Honor that we will adduce testimony which shows whether or not there was any necessity for the appointment of a guardian * * * (R. 159),

this statement was immediately followed by the following text:

> I can say we will offer to this Court testimony of an expert witness who has examined Hattie Kulamanu Ward and who has prepared a report here, who can be brought here in person. It is not for counsel; it is not for Lucy K. Ward to determine the degree of the

> competency of Hattie Kulamanu Ward. It is for the Court after hearing evidence, to determine—

While counsel was interrupted by the probate judge before being permitted to complete the sentence, the full paragraph as stated is an unexceptional statement of law that the court is to determine, under Hawaiian law, whether an alleged incompetent is *non compos* after hearing the evidence, and that the judgment of a person being *non compos* is a legal judgment to be entered by the court based on evidence and not assertions of legal conclusions by counsel.

The mere conclusion of the psychiatrist employed by the guardian *ad litem* seems scant evidence on which to justify the probate judge depriving Hattie Kulamanu Ward of the right to control her property, and to select agents of her own choice.

With respect to the showing of the conflict of interests between the Hawaiian Trust Company and Victoria Ward, Limited, in which Hattie Kulamanu Ward owned substantial shares of stock, on the return day of the hearing on the order to show cause, counsel, rather than stating a conclusion of law to the court as to whether there were adverse interests in the very nature of the business of the Hawaiian Trust Company and Victoria Ward, Limited, quoted the purposes as set forth in the articles of association of Victoria Ward, Limited (R. 167-169). Judge Cristy, the Supreme Court of the Territory, and this Court can take judicial notice that the purposes of Victoria Ward, Limited, as shown by the articles of association, are to a large extent identical with the business and powers of a trust company under Section 8655, Revised Laws of Hawaii, 1945. While Victoria Ward, Limited, was not organized *per se* as a trust company, in many respects—in fact most respects—it engaged in dealing with real property and securities which trust companies under the law of Hawaii, likewise engage in.

In the motion to vacate the appointment of the Hawaiian Trust Company, for rehearing, or to remove the guardian, specific conflicts of interest, as well as general conflicts of interest between the Hawaiian Trust Company, Limited and Victoria Ward, Limited, in which the alleged incompetent owned approximately 23% of the capital stock, are alleged (R. 38-41).

While the appointment of an officer of the Hawaiian Trust Company as a member of the board of directors of Victoria Ward, Limited might be legally appropriate in event there were no conflicting interests, it would not be legally proper if there were a conflict of interest between the two companies either under the law of guardianship or the law of fiduciary and corporate relations.

The Molokai ranch transaction occurred in 1947, fully a year and a half before the family disputes arose which resulted in the filing of the guardianship petition by appellees. The probate judge passed judgment on the transaction without any facts whatsoever on which to base that judgment.

While it is true that the constitutionality of Section 12509 was not assigned as error in the writ of error proceeding, it was raised and ruled on by the Supreme Court, and that decision, though erroneous, will stand unless reversed by this Court.

The Supreme Court's holding that Section 12529 contemplates removal of a guardian only for grounds which arise after the appointment of a guardian constitutes a revision of the statute by the Court. The statute on its face fixes no time limit within which to raise questions concerning the suitability of a guardian, although naturally a suit for removal could not arise until after appointment.

It is not generally accepted practice to set forth in verified motions or petitions all elements of evidence intended to be introduced in support of the allegations contained there-

in. The probate judge was not fully advised of the facts because no opportunity was afforded to support the allegations of the verified motion by evidence.

The Supreme Court's sanctioning of the attack upon Lucy K. Ward by Judge Cristy without any facts before him warranting such an attack seems an abandonment by the Supreme Court of its duty to search the record to determine whether applicants are given a fair hearing before a fair tribunal.

**PRELIMINARY STATEMENT OF HAWAIIAN DECISIONS CONSTRUING SECTION 12509, REVISED LAWS OF HAWAII, PRIOR TO THE DECISION IN THE INSTANT CASE.**

Section 12509, Revised Laws of Hawaii, has been infrequently before the Supreme Court of the Territory for construction.

In *Re Estate of William Brash,* 15 Haw. 372, the Supreme Court of Hawaii held that an adjudication that a person is of unsound mind and unable to take care of his property is null and void where no notice of the proceedings or opportunity to be heard is given to the supposed insane person, even if the person declared insane was actually in court at the time the guardian was appointed in connection with other matters.

In *Kalanianaole v. Liliuokalani,* 23 Haw. 457, an action was instituted for Liliuokalani by next friend on the ground of a weakness of mind of Liliuokalani. Liliuokalani appeared and controverted the right or authority of her next friend, and denied that she was of weak mind necessitating the prosecution of the action by next friend. The court held Liliuokalani was entitled to a judicial determination of her competency before the action could proceed.

To the same effect, see *Nawahie v. Kamalani,* 24 Haw. 85. In the latter case, the court further held that a judicial hear-

ing and the taking of evidence is required to establish mental incompetency, and that the taking of evidence of one witness followed by refusal on the part of the court to hear any other or further evidence falls short of a judicial inquiry. The court said:

> It therefore follows that there is but one question presented for our consideration by the record in this case, to wit, was a fair judicial inquiry upon the issues had when but a sole witness (the alleged incompetent) was permitted to testify; or did the trial judge abuse his discretionary power in peremptorily terminating the inquiry upon the conclusion of the evidence of this witness and by refusing to hear any other evidence and by dismissing the suit? Counsel for respondent appears from the record herein to have been prepared and anxious to present other evidence, but was denied the right to so do by the ruling of the trial judge, following which the judge ordered a dismissal of the suit. This action of the judge is the burden of appellant's grievance for which she now seeks the interposition of this court.
>
> A judicial inquiry contemplates an adjudication of the adverse claims. It corresponds to a judicial hearing and implies a judicial examination of the issues between the parties, whether of law or of fact; the receiving of facts and arguments and the right to adduce testimony. See 21 Cyc. 408. A trial judge may in any proceeding properly refuse to hear cumulative evidence upon a question already fully established, but it is our opinion that no court has a right in relation thereto, to deny the party having the affirmative of the issue the right to present any other or further evidence thereon. Such a procedure, in our opinion, falls far short of a judicial inquiry as contemplated by the law.

In *Re Pires,* 28 Haw. 269, the Supreme Court of Hawaii held that it was not necessary to the jurisdiction of the circuit court to appoint a guardian of an insane person that he be violent or dangerous to the safety of the community;

that it is sufficient if it appears that mental unsoundness exists to such a degree as to render it necessary that a guardian be appointed for the protection of the person or estate of the alleged insane person. The evidence in this case showed that the alleged incompetent suffered from periodic mental distractions of extended duration which rendered her for the time being incapable of caring for her person or property.

*Guardianship of Kawai,* 33 Haw. 643, closely parallels this case, since the only testimony before the court was the testimony of petitioner Lani Booth and Edward Hustace, and the record shows only the conclusion of the alienist on which the court, without making any finding of insanity, relied in holding Hattie Kulamanu Ward incompetent to manage her property. The Supreme Court in the *Kawai* case held that *non compos,* as that term is employed in Section 4858, Revised Laws of Hawaii, 1935, which is substantially the same as the present section 12509, is a person of such unsoundness of mind as to be incapable of taking care of himself and his property. The court said:

> It is obvious from a reading of the statute that contrary to the statement contained in the decree it does not define the term "non-compos" and the generic significance of that term is left unimpaired further than it may be qualified by its association with other named types of persons of unsound mind which the statute declares the words "insane person" are intended to include and is to be so construed in all provisions of statutory law relating to guardianship and wards.
>
> Etymologically a "non-compos" person is the logical antithesis of a "compos" person or person of sound mind. In a legal and general sense used in connection with the statutory grant of jurisdiction to appoint guardians of the person and estate of insane persons the term *non-compos* may be considered as a person of such unsoundness of mind as to be incapacitated thereby from taking care of his property. *In the Matter*

> *of Barker,* 2 Johns. Ch. (N.Y.) 232. R. L. H. 1935, § 4859, however, expressly requires that before a guardian be appointed for an insane person it affirmatively appear that the person in question is incapable of taking care of himself. So that it may be said that the term *non-compos* as employed in section 4858 is a person of such unsoundness of mind as to be incapable of taking care of himself and his property.

See also *Guardianship of Pratt,* 34 Haw. 935, discussed hereinafter.

One of the appellees, Lani Booth, since this appeal was docketed in this Court, filed, in the same guardianship proceedings, with the same file number, a "Petition for Appointment of Guardian of the Person" of Hattie Kulamanu Ward. The petition after hearing was dismissed by the probate judge. A copy of the decision is set forth as Appendix I of this brief.

**I. APPELLANTS' REPLY TO ARGUMENT UNDER POINT I OF APPELLEES' ANSWERING BRIEF (pp. 13 through 19). PROCEEDINGS TO ADJUDICATE INSANITY, IN HAWAII, ARE SUITS AT COMMON LAW IN WHICH, UNDER THE FIFTH AND SEVENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, A TRIAL BY JURY IS GUARANTEED.**

In respect to the appellees' assertion under this point of its brief that this issue was raised for the first time before the Supreme Court, it is pointed out that it has long been the law in Hawaii, as generally, that jurisdictional questions may be raised at any time and may be raised for the first time on appeal. Thus, in *Territory v. Correa,* 24 Haw. 165, the Supreme Court of the Territory stated:

> The objection for want of jurisdiction, if it exists, may be raised by answer or at any subsequent stage of the proceeding and may be raised for the first time on appeal. It may, as a matter of fact, be raised by the court on its own motion. (citing authorities.)

See also 14 *Am. Jur.,* Courts, Section 191, citing *Territory v. Coney* and other cases.

Probate courts are almost universally held to be courts of limited jurisdiction and cannot administer remedies except as provided by statute.

14 *Am. Jur.,* Courts, Section 8.

If the statute under which such a court purports to act is unconstitutional, the court has no jurisdiction. The power of the probate court to appoint guardians under Section 12509 is purely statutory, and if the statute is unconstitutional the court has no power to proceed under it.

The truncated quotation of appellees of *Montana Co. v. St. Louis Mining Co.,* 152 U.S. 160, 38 L. ed. 398, is misleading. That case involved the question of whether a section of the Montana code of civil procedure authorizing a court or judge of the state of Montana to order an inspection, examination or survey of a lode or mining claim was repugnant to the Fourteenth Amendment of the United States Constitution. The passage quoted merely holds that due process of law under the Fourteenth Amendment in respect to state proceedings does not require a jury trial.

Appellants do not urge that the due process clause of the Fourteenth Amendment is applicable to the Territory of Hawaii or that the due process clause of the Fifth Amendment standing alone requires a jury trial in lunacy proceedings. Appellants urge that the due process clause of the Fifth Amendment, read in conjunction with the Seventh Amendment, interpreted in the light of the common law existing at the time of the adoption of the Bill of Rights, guarantees a right to a jury trial in lunacy proceedings in federal and territorial courts. As was pointed out in appellants' opening brief, the Seventh Amendment does not apply to state court proceedings. It applies only to proceedings in the federal court and to territories to which, like

Hawaii, the Constitution and the Bill of Rights have been extended.

Some state courts have reached the conclusion, under their constitutions, that the provision that the right to jury trial shall remain inviolate guarantees the right to a jury trial in insanity proceedings. See exhaustive discussion of authorities on this point in appellants' opening brief.

Other states, because of the law in force at the time of the adoption of the state constitution, have reached a contrary conclusion. Wisconsin is one of the states which reached a contrary conclusion. The statement in the Montana case holds no more than this and cites a Wisconsin case so holding.

The appellees urge that a lunacy proceeding is not a suit at common law within the Seventh Amendment. Primarily, this contention appears to be based on the fact that a lunacy proceeding is not primarily legal in its nature.

Appellees rely upon the language in *Parsons v. Bedford,* 3 Peters 433, 7 L. ed. 732. Appellants likewise called the court's attention to *Parsons v. Bedford* in their opening brief, and pointed out the discussion therein which calls attention to the fact that the best contemporaneous construction of the Seventh Amendment by Congress was contained in the Judiciary Act of 1789, which was contemporaneous with the proposal of the Seventh Amendment. The ninth section of that act provided:

> The trial of issues of fact in the district courts in all causes except civil causes of admiralty or maritime jurisdiction, shall be by jury.

Clearly the question of lunacy is a question of fact and does not arise in either admiralty or maritime jurisdiction.

Appellees assert that no case has been cited to this Court holding that an insanity proceeding is an action at law. The cases cited by appellants, however, show clearly that under the English common law, the Chancery Court had

no jurisdiction over the estate or person of a lunatic until after a jury had found him to be *non compos*. The language of the Seventh Amendment is not "action at law" but rather "suits at common law."

The leading Maryland case, *Hamilton v. Traber,* 27 A. 229, 230-232, cited by appellants at page 23 of their opening brief, relates this history of the writ of *de lunatico inquirendo:*

> Lunacy or mental unsoundness did not give the English court of chancery jurisdiction over the person or estate of a lunatic until after an inquisition of a jury adjudging the person to be a non compos mentis had been first regularly found. The authority directing the inquisition to be taken did not pertain to that court, but was derived by delegation from the crown. It was a portion of the king's executive power, as parens patriae, and did not belong to the court of chancery by virtue of its inherent and general judicial functions. This branch of the regal authority was delegated to the crown, by means of an official instrument called the "Sign Manual," signed by the king's own signature, and sealed with his own privy seal, and was exercised by the chancellor alone, and not by the court of chancery. 3 Pom. Eq. Jur. §1311; *Eyre v. Countess of Shaftsbury,* 2 P. Wms. 103; *Oxenden v. Lord Compton,* 2 Ves. Jr. 69; *Lysaght v. Royse,* 2 Schoales & L. 151; *In re Fitzgerald,* Id. 432. Anciently, in point of fact, the custody of the persons and property of idiots and lunatics, or at least of those who held lands, was not in the crown, but in the lord of the fee. The statute de prerogativa regis, the seventh of Edw. II, c. 9, gave to the king the custody of idiots, and also vested in him the profits of the idiot's lands during his life. By this means the crown acquired a beneficial interest in the lands, and, as a special warrant from the crown is in all cases necessary to any grant of its interest, the separate commission which gave the lord chancellor jurisdiction over the persons and property of idiots may be referred to this consideration. With respect to

> lunatics, the statute of 17 Edw. II, c. 10, enacted that the king should provide that their lands and tenements should be kept without waste. It conferred merely a power, which could not be considered as included within the general jurisdiction antecedently conferred on the court of chancery, and therefore a separate and special commission became necessary for the delegation of this new power. Story, Eq. Jur. §1335. The existence of this vested interest in the crown is the reason that mere lunacy did not originate the jurisdiction of the court of chancery over the persons and estates of idiots and lunatics, but the lunacy had first to be inquired of by a jury, and found of record, in accordance with the rule of law, wherever a right of entry is alleged in the crown. After this special jurisdiction conferred by the "Sign Manual" had been exercised in any particular case by adjudging an individual to be a lunatic, and by appointing a committee of his person and property, a further jurisdiction then arose in the court of chancery to supervise and control the official conduct of the committee. 3 Pom. Eq. Jur. §1311; *Ex parte Grimstone,* Amb. 707.

In *In re Bristor's Estate,* (Md.) 81 Atl. 25, 28, the court said:

> It is to be observed that the Code, while conferring upon courts of equity general jurisdiction with respect to persons non compos mentis, does not prescribe the method by which the incapacity shall be ascertained. The course of procedure leading up to an adjudication of mental unsoundness remains as it existed, independently of statute, under the English practice, whose origin and theory are fully and clearly discussed in *Hamilton v. Traber,* 78 Md. 26, 27 Atl. 229, 44 Am. St. Rep. 258.

There is not complete unanimity of the legal authorities on the question of the history of the writ *de lunatico inquirendo.* As even appellees concede, however, the pro-

cedure in most colonies at the time of the revolution, in respect to insanity proceedings, included a jury.

Cooley's *Blackstone,* 4th Ed., Vol. 1, page 261, says:

> By the old common law there is a writ *de idota inquirendo* (of inquiring concerning an idiot) to inquire whether a man be an idiot or not, which must be tried by a jury of twelve men.

The same author, at page 263, says:

> The method of proving a person non compos is very similar to that of proving him an idiot.

The same attitude is expressed by Buswell on Insanity, page 35, and in Pomeroy's Equity Jurisprudence, §1312.

As appellants read these authorities, they hold that the common law method of declaring a person an idiot or a lunatic was by a common law jury.

The statutory law of the District of Columbia is at variance with cases arising in the District cited in appellants' opening brief, page 20. The validity of these statutes, as well as the statutes of territories, so far as appellants have been able to discover, has never been squarely determined by the United States Supreme Court.

Since the decision of the Supreme Court of the Territory of Hawaii in *In Re Atcherley,* 19 Haw. 346, in 1909, it has been settled law in the Territory that an alleged incompetent is not entitled to a jury trial on the question of whether he is of sound mind. Section 9648, Revised Laws of Hawaii, 1945, subdivision 6, cited by appellants, which authorizes the judges of the several circuit courts at chambers to select and impanel a special jury of inquiry and then to act upon the verdict of the jury as equity and good conscience require, does not meet the constitutional requirements to a jury trial given by the Seventh Amendment to the Constitution.

Hattie Kulamanu Ward never appeared in the proceedings to declare her incompetent, except by the guardian *ad litem* appointed for her by the court, and by Lucy K. Ward, next friend, who specifically urged this question before the Supreme Court.

If the Fifth and Seventh Amendments to the Constitution of the United States guarantee, as appellants urge, the absolute right to a jury trial in lunacy proceedings, the provisions of Section 9648, subdivision 6, of Revised Laws of Hawaii, 1945, do not satisfy that constitutional guarantee, particularly in the light of the decision of the Supreme Court of the Territory in *In Re Atcherley, supra.*

As is pointed out in appellants' opening brief, there also seems to be considerable doubt as to whether in lunacy proceedings there can be an effective waiver of a jury trial. If there is, as appellants urge, a constitutional right to a jury trial in insanity proceedings under the Fifth and Seventh Amendments, the doubtful right under Hawaiian law to ask for the impanelling of an advisory jury does not satisfy that legal right, for if such right exists, it is absolute and the decision of the jury is binding on the court to the same extent that other jury verdicts are binding.

**II TO IV. APPELLANTS' REPLY TO ARGUMENT UNDER POINTS II TO IV OF APPELLEES' ANSWERING BRIEF (pp. 19 through 27).**

**ABUSE OF DISCRETION AND ERRONEOUS STATUTORY CONSTRUCTION AMOUNTING TO A DENIAL OF DUE PROCESS OF LAW APPEAR IN THE RECORD IN THIS CASE. ALTERNATIVELY, MANIFEST ERROR REQUIRING REVERSAL OF THE SUPREME COURT OF THE TERRITORY BY THIS COURT APPEARS.**

Appellants' points III, IV, V and VI in their opening brief, pages 29 to 46, discuss fully the points covered in appellees' answering brief, points II to IV.

**A. ABUSE OF DISCRETION AMOUNTING TO A DENIAL OF DUE PROCESS OF LAW, OR, ALTERNATIVELY, MANIFEST ERROR IS APPARENT ON THE RECORD, REQUIRING REVERSAL BY THIS COURT.**

It is appellants' contention that there is either an abuse of discretion amounting to a denial of due process of law, or, in the alternative, manifest error which entitles appellants to a reversal of the decree on appeal and judgment on writ of error of the Supreme Court of the Territory. Appellants base this contention on the following facts appearing of record:

The record of the hearing on the petition for the appointment of a guardian of Hattie Kulamanu Ward discloses that Hattie Kulamanu Ward, who appears in this appeal by Lucy K. Ward, her next friend, has four sisters: Lani W. Booth and Mellie E. Hustace, appellees, and Lucy K. Ward and Kathleen Ward, appellants.

Lani W. Booth and Mellie E. Hustace, appellees, petitioned for an adjudication that Hattie Kulamanu Ward was insane and sought the appointment of Hawaiian Trust Company as her guardian. Lucy K. Ward and Kathleen Ward, appellants, objected to the proceedings through counsel, or, in the alternative, asked that one or either of them be appointed guardian, or, as an alternative to that, that any trust company other than the Hawaiian Trust Company sought by appellees be appointed.

With these facts before him, the probate judge ruled that appellants, Lucy K. Ward and Kathleen Ward, had no standing to object and had conflicting interests as a matter of law. The only result of this decision can be to place a premium on rushing into court first to seek an adjudication of incompetency of a relative under the provisions of Section 12509, Revised Laws of Hawaii, 1945.

It also appears of record that Hattie Kulamanu Ward has lived all her life with appellants, Lucy K. Ward and Kathleen Ward, and that she was in good hands and that there

was no necessity, in her condition or otherwise, for the appointment of a guardian of her person or any change in respect to the circumstances of her life personally.

The only logical inference from these facts is that the two appellants, Lucy K. Ward and Kathleen Ward, were closest to Hattie Kulamanu Ward, by ties of relationship and life-long association. Appellants were the natural guardians of Hattie Kulamanu Ward; and if a legal guardian was appointed, they were certainly entitled to be considered for appointment on the basis of facts and evidence, rather than a legal conclusion unsupported by authorities and announced by the probate judge solely for the purposes of this case. Appellants, as appears by the record, were the persons in whom Hattie Kulamanu Ward had in fact relied all her life, and in whom she had placed her trust and confidence.

There was no showing of any kind of any conflict of interest between appellants Lucy K. Ward, Kathleen Ward and Hattie Kulamanu Ward. There is a mere suggestion or inference from the testimony of appellee Lani Booth against Lucy K. Ward, in that Mrs. Booth testified that Lucy K. Ward had purchased a ranch in part with Hattie Kulamanu Ward's funds, which Mrs. Booth did not consider a good investment (R. 125).

Mrs. Booth, in her testimony at the hearing on the petition, made no such charge of fraud as the probate judge and counsel for the guardian made at the return day on the motion, nor did she make any assertion that the joint tenancy of Lucy K. Ward and Hattie Kulamanu Ward in the ranch was improper. The purchase of the ranch, as appears by the record, took place at least a year and a half before the proceedings were instituted.

In respect to Victoria Kathleen Ward, there was not even a suggestion or inference of any kind of a conflict of interest, nor of her unfitness to serve.

There appears on the record of the hearing on the petition for the appointment of the guardian alone, appellants believe, an abuse of discretion of such magnitude as to constitute denial of due process of law, or in the alternative, manifest error requiring reversal.

The Supreme Court of Wisconsin, confronted with a somewhat analogous situation to that which exists here, said, in *Appeal of John Royston,* 53 Wisc. 612, at page 624:

> We are, however, inclined to think that under the statute the county court should not proceed to the appointment of a guardian under the statute, when there are near relatives of the person, with whom he resides, or who have the care of him, on the application of a friend, unless it appears from the petition that there is some good reason why the application is not made by such relatives. The statute, we think, contemplates that the relatives shall make the application, when there are any in the immediate vicinity of the insane or incompetent person; and this should be so, especially when the court proceeds to appoint a guardian of the person of one insane or incompetent. The custody of a father, or grandfather, should not be taken from a son, or daughter, or grandchild, or other near relative, on the application of one not being a relative, unless there be some other reason shown than that his physical and mental powers have become enfeebled by age, and certainly not upon the application of a person who makes the application because of some ill-will or misunderstanding between himself and the person who has the management of his estate. See *Francke v. His Wife,* 29 La. Ann., 302, 309.

This was the state of the record at the time the motion of Lucy K. Ward, next friend of Hattie Kulamanu Ward, for rehearing and for revocation of the order of appointment of the guardian, or for the removal of the guardian on the ground of unsuitability, came on for hearing. This verified motion brought to the attention of the probate

judge facts which clearly were not known to the probate judge at the time of the selection of the guardian, concerning the nature of Hattie Kulamanu Ward's estate, the motives of the appellee sisters who petitioned for the appointment of the Hawaiian Trust Company, the unsuitability and conflicting and antagonistic interests of the appointed guardian, the stock situation in respect to the family corporation—which showed that the appointment of the Hawaiian Trust Company would in effect change the management and control of the family corporation—and many other matters relevant and essential for the probate judge to know before an equitable determination could be made as to the proper guardian to be appointed, if a guardian was necessary.

It is apparent from the record that none of these most important facts were made known to the probate judge by the appellees or brought to his attention by the guardian *ad litem.*

But even more important, from the standpoint of equity and good conscience, were the allegations that the next friend of the alleged incompetent had obtained and desired to place before the court further evidence on the issue of competency.

When the grave nature of proceedings to declare a person *non compos mentis,* and to take from him his right of personal liberty and his right to control his property, is considered, the duty of a court of equity to inform itself of all facts is inescapable. The potentiality of abuse of the statute and the danger that it may, if not administered with the utmost caution, be used as a vehicle for bringing about the very purpose it was designed to prevent, has been strongly and frequently emphasized by courts.

In *In Re Bryden's Estate,* (Pa.) 61 A. 250, where it appeared that five of seven children of the alleged incom-

petent sought an appointment of a guardian, the court dismissed the petition, saying:

> Before an estate can be taken from the owner and transferred to a guardian, it must be established that the respondent is so weak in mind that he is unable to take care of his property, and in consequence thereof is liable to dissipate or lose the same and to become the victim of designing persons. The act is for the respondent and is not intended to prevent the owner of an estate from doing with his own what he pleases in order that his children may inherit a greater amount. . . . Applications of this nature are not to be encouraged and should not be granted except in a clear case. As is declared in *Hoffman's Estate,* 209 Pa., 58 A. 666, it is a dangerous statute easily capable of abuse by designing relatives to accomplish the very wrong intended to be guarded against, and therefore to be administered by the courts with the utmost caution and conservatism. It is the policy of the law to allow an owner to manage his own estate, and it can be taken from him only for his own personal good, and not because his children think they, or someone of them, can manage it to better advantage.
>
> . . .
>
> All that can reasonably be expected of a woman seventy-six years old, in the management of her estate is the selection of a competent and trustworthy agent and this she has done. The court could do no more.

In *Denner v. Beyer,* (Pa.) 42 A. 2d 747, the Supreme Court of Pennsylvania reversed an order appointing a guardian and strongly cautioned that the statute providing for the appointment of guardians must be administered with utmost caution because of the seriousness of the deprivation of rights, if justice is to be done.

It has been frequently held that an application for an adjudication of insanity and the appointment of a guardian is addressed to the sound discretion of the court, and does not issue as a matter of right. See *In Re Gottsman,* 48

A. 2d 800, reversing the order appointing a guardian for an 89-year old man on the petition of some of his children.

The court in *In Re Wiesenberg,* 3 N.Y.S. 2d 745, reversed the lower court's action in appointing a guardian, saying that the application should have been denied for the reason that the incompetent is receiving all the care and her property all the protection which circumstances require.

See also *In Re Walter's Estate,* 208 P. 2d 713.

The high degree of proof and the urgent reasons necessary to support so serious a deprivation of liberty and property has been frequently commented on by courts.

*Greenwade v. Greenwade,* 43 Md. 313.

*Re Streiff,* 119 Wis. 566.

*In re Mills,* 27 N.W. 2d 375.

In the *Mills* case, the court rejected as proof of incompetency the fact that an 80-year old had executed a power of attorney, pointing out that a power of attorney could be revoked at any time, and that the attorney is liable for any misconduct.

Abuse of discretion in the appointment of guardians or in the failure to appoint nominees of persons closest to the alleged incompetent were found in the following cases, which, on the facts, are closely analogous to the instant case.

*In Re Williams,* 298 N.Y.S. 883.

*In Re Rothman,* 118 N.E. 147.

In the *Williams* case, the court stated the principle as follows:

> The practice has become recognized and well established that the court, in the absence of a valid objection, should name as a committee of the person and property of an incompetent the choice of the incompetent's next of kin, rather than some stranger, unless it is impossible to find within the family circle, or their nominees, one who is qualified to serve. *In re Rothman,* 263 N.Y. 31, 188 N.E. 147; *In re Foster's Estate,* 254 N.Y. 614, 173 N.E. 890; *Matter of Dietz,* 247 App. Div. 366,

287 N.Y.S. 392; *Matter of Cooper,* 105 App. Div. 449, 94 N.Y.S. 270; *In re Lamoree,* 32 Barb. 122.

This has long been acknowledged as a salutary rule, and there should be no departure from the practice, except for a good and valid reason. We find no sufficient explanation why this rule was not followed in the instant case. As is pointed out by Judge Hubbs in *Re Rothman,* 263 N.Y. 31, at page 33, 188 N.E. 147, the disregard of the principle, and the arbitrary appointment of one selected by the court over the wishes of the relatives of the incompetent, can only lead to criticism of the court, and resentment by the parties most interested in the proceeding. The welfare of an incompetent is a matter of public concern, and should be given most careful consideration. As a general rule, those nearest to such a one are deeply concerned in his comfort and care, and their counsel and advice should not be ignored or overlooked. Of necessity a committee must maintain more or less intimate relations with the relatives of his ward, and their wishes as to the personnel of the committee, unless they clash with the well being and happiness of the incompetent, should be controlling.

For the reasons stated, we think that the order appealed from should be reversed in so far as it relates to the naming of the committee.

The two intervening sisters, Lucy K. Ward and Kathleen Ward, whose request to be considered by the court for appointment was summarily denied without any investigation whatsoever, own extensive property jointly with Hattie Kulamanu Ward. The appointment of the Hawaiian Trust Company, the nominee of the other two sisters, left appellants Lucy K. Ward and Kathleen Ward helpless to deal with a substantial portion of their own property without the consent of a corporation to whose appointment they voiced strong objections, and whose counsel and whose agents were strongly antagonistic to them personally, as is shown by this record.

In addition to the joint property, it appears that appellants Lucy K. Ward and Kathleen Ward own approximately 40% of the shares in the family corporation, Victoria Ward, Limited, and that Hattie Kulamanu Ward, the alleged incompetent, owns 23% of the stock of this family corporation. The appellee sisters, on the other hand, who sought to declare Hattie Kulamanu Ward insane and to secure the appointment of the Hawaiian Trust Company, together own only 17% of the stock of the family corporation. Thus, appellees, who were minority stockholders, were able to wrest the control of the family corporation from existing management by the device of seeking a guardian friendly to them and with connections with other stockholders of the corporation.

The refusal to appoint the nominees of the next of kin in *In Re Dietz,* 287 N.Y.S. 392, was held to be abuse of discretion. In the *Dietz* case as here, the management of a family corporation was involved.

The court said:

> In the exercise of jurisdiction of the Supreme Court dealing with the affairs of incompetents, it has long been the rule that strangers will not be appointed as committee of the person or property of the incompetent, unless it is impossible to find within the family circle, or their nominees, one who is qualified to serve.
>
> The same principle has been authoritatively declared as a part of the law of this state in a recent decision in our own Court of Appeals, which states: "A disregard of such principles and the arbitrary appointment of one selected by the court without notice can only lead to criticism of the court and resentment on the part of the next of kin and parties in interest." *In re Rothman,* 263 N.Y. 31, 33, 188 N.E. 147. We think the appointment improvident in the circumstances and warranting revocation.

The facts appearing of record in the *Dietz* case in respect

to the family corporation are set forth in *In Re Pfleghar,* 62 N.Y.S. 2d 899, where the court said:

> In *Matter of Dietz,* 247 App. Div. 366, 287 N.Y.S. 392, 394, it appeared that the Special Term "without stating any reason, and unsupported by anything in the record" disregarded the wishes of the incompetent's son and of all the adult members of the family as well as of the representative of the infants and of the alleged incompetent herself and named a person of its own choice as an additional member of the committee. An examination of the record and briefs in this case show that the administration of the estate there was involved, entailing among other things, the management of a large business (R. E. Dietz Company) of which the nominees of the next of kin were officers and directors —factors not present in the case at bar where the estate consists entirely of cash and securities and one small piece of real property. It further appeared and was argued that the appointment of an additional member of the committee who would be entitled to full commissions constituted an unjustifiable waste of the assets of the estate. On these facts, the Appellate Division found the "arbitrary appointment of one selected by the court" to be "improvident in the circumstances."

Where the control of a family corporation, as here, turns on the person or corporation selected by the probate judge as guardian, and where there is a dispute within the family which owns the stock of the family corporation, it would seem that the very least that a court of equity could do, under the circumstances, would be to refuse to appoint the nominee of either side, and to select an impartial nominee. This most reasonable request was made to the probate judge at the hearing on the petition for the appointment of a guardian by appellants.

The facts alleged in the verified motion of appellant Lucy K. Ward, concerning the family corporation, show the likelihood that the dispute over the management of the corpora-

tion and not the welfare of Hattie Kulamanu Ward, the alleged incompetent, was the motive for the filing of the petition for the declaration of insanity and for the selection of the Hawaiian Trust Company rather than some other trust company or person as guardian.

**B. ERRORS OF LAW AND STATUTORY CONSTRUCTION AMOUNTING TO A DENIAL OF DUE PROCESS OF LAW, OR, IN THE ALTERNATIVE, MANIFEST ERROR, REQUIRE REVERSAL OF THE JUDGMENT AND DECREE OF THE SUPREME COURT OF THE TERRITORY.**

It is appellants' contention that errors of law and statutory construction amounting to a denial of due process of law, or, in the alternative, manifest error, require reversal of the judgment and decree of the Supreme Court of the Territory.

Appellants base this contention on the following errors of law apparent on the record in these proceedings:

1. The probate judge erred as a matter of law in appointing a guardian *ad litem* for Hattie Kulamanu Ward, the appointment not being authorized, under these circumstances, by Section 12509, and it being improper as a matter of law to appoint a guardian *ad litem* for an adult before a determination of competency.

*Mussi's Guardianship,* 64 N.Y.S. 2d 484.

See also *Warrick v. Moore,* 291 S.W. 950, 956.

No consent of Hattie Kulamanu Ward appears of record, nor any evidence that she was given notice of the court's intention to appoint a guardian *ad litem* for her.

2. A finding of personal service on the alleged incompetent and a finding that the alleged incompetent is *non compos mentis* are jurisdictional. Section 12509 requires notice to be served upon the alleged incompetent. Indeed, if it did not, it would clearly be unconstitutional in this respect. Appellees urge that reference to the sheriff's return is sufficient to establish notice.

It has been specifically held that notice is jurisdictional

and must be found as a fact by the court and appear of record in order to sustain the judgment.

In *McElroy v. Pegg,* 167 F. 2d 668, there was no showing to the court or no finding of personal service upon the alleged incompetent. The record did recite that the alleged incompetent appeared in person. Neither did the record find or adjudge that the alleged incompetent was in fact incompetent or incapable of taking care of herself or managing her property. The court said:

> On November 7, 1918, the county court of Pontotoc County entered an order appointing N. S. Olivo as the guardian of Harjo. It recited that notice of the hearing was given by posting the notice of application for the appointment of a guardian in three public places in Pontotoc County, Oklahoma. It did not recite that the notice was personally served on Harjo. It recited that Harjo appeared in person. It found that Harjo desired the appointment of Olivo as her guardian but did not find or adjudge that Harjo was incompetent or incapable of taking care of herself or managing her property. . . .
>
> The trial court found that the order appointing Olivo guardian of Harjo was void because (1) notice of application for appointment was not personally served upon Harjo and (2) that there was no finding or adjudication that Harjo was incompetent; that Harjo was not incompetent in fact at the time of the execution of the deed from her to Pegg; that the evidence failed to establish any fraud in the procurement of the deed from Harjo to Pegg; and that the consideration paid by Pegg to Harjo was not inadequate.
>
> . . .
>
> Here, there was no showing of personal service upon Harjo and it was a reasonable inference from the recitals in the order of appointment that notice was not personally served upon Harjo. Moreover, the order of appointment did not find or adjudge the statutory grounds for the appointment of the guardian.
>
> It follows that the order appointing a guardian for

Harjo was void and created no presumption of the incompetency of Harjo.

In *People ex rel Spencer,* 55 N.Y. 1, 4, the court said:

> If any facts required to be stated are omitted, all the subsequent proceedings are fatally defective. It does not aid the proceedings that the facts exist, or that they are, in some other way, or at another stage of the proceedings, brought to the knowledge of the officer, or that the statement of them may seem unnecessary in view of the inquiry and adjudication which he is authorized to make. The statute prescribed the proof which is to be presented to the County judge. It is material because the statute requires it. It must be presented in the form and at the time required, or the officer acquires no jurisdiction. (*Vosburgh v. Welch,* 11 J.R. 175; *Adkins v. Brewer,* 3 Cow., 206; *Bloom v. Burdick,* 1 Hill 130.)

See also *Shields v. Shields,* 26 F. Supp. 211, 215.

As appellants construe Section 10060, it does not relieve the court from making findings as to jurisdictional fact.

In *Guardianship of Pratt,* 34 Haw. 935, an alleged incompetent appealed from an order overruling his demurrer to the petition of his daughter for the appointment of a guardian of the property of his estate. The petition alleged that the appellant:

> . . . by reason of advanced age and physical and mental infirmities has been incompetent to understand business affairs or to care for his property and is now *non compos mentis.*

The court pointed out that for the purposes of the demurrer, the allegations of the petition were to be taken as true. The court said:

> It could not be successfully maintained that a petitioner in such a case as this need not allege that the person for whom a guardian is sought is insane. How-

> ever, that term has a special meaning given it by our statute and includes persons who are *"non compos."* The term *"non compos"* includes those persons whose minds are so worn out by old age as to render them unable to care for their property. (*Matter of Barker,* 2 Johns. Ch. [N.Y.] 232.) The petition before us not only alleges that Mr. Pratt is *"non compos"* but attributes his condition to advanced age and physical and mental infirmities. The petition is not, therefore, subject to the criticism that it fails to allege that Mr. Pratt is insane within the meaning of our statute.

The *Pratt* case does not hold, as appellants understand it, that the court need not find that a person is insane before appointing a guardian. Indeed, Section 12509 specifically says that a guardian may be appointed:

> . . . if after full hearing it shall appear to the judge that the person in question is insane.

The *Pratt* case further holds that the court need not appoint the guardian sought by the petitioners. The court said:

> . . . It is in fact the common practice for the court to inquire into the suitability of the nominee and if not found suitable refuse to appoint him and appoint a suitable one.

Appellants contend that the probate judge refused to do just this.

3. The probate judge erred as a matter of law in holding appellants Lucy K. Ward and Kathleen Ward had no standing to object. Thus, it has been held that brothers and sisters of an alleged incompetent who were nearest relatives were persons aggrieved and entitled to appeal from a decree adjudging incompetency and appointment of guardian.

*In Re Fior,* 50 A. 2d 523 (Ohio).

*Commonwealth v. Davidson,* 112 A. 115 (Pa.)

The right of the next friend to appeal on behalf of the alleged incompetent is clear.

*Fulmer v. Wilkins,* 37 S.E. 2d 405.

*Beil v. Gaertner,* 197 S.W. 2d 611.

4. The court erred as a matter of law in holding that the motive of petitioners was not relevant.

*Denner v. Beyer,* 42 A. 2d 747, 748.

5. A new hearing should be granted if there is any suggestion of cause or any hint of being or prejudice in guardianship proceedings.

*Tebout's Case,* 9 Abb. Prac. (N.Y. 1859).

*Warrick v. Moore Co.,* 291 S.W. 950.

**C. APPELLEES ERRONEOUSLY INTERPRET THE DECISION OF THE SUPREME COURT AND TERRITORIAL LAW IN RESPECT TO SUPREME COURT'S REFUSAL TO CONSIDER APPELLANTS' FIRST SIX ASSIGNMENTS OF ERROR.**

Under the law of the Territory, notice of an appeal must be made within ten days and writ of error may be made within ninety days. At the time of the filing of the motion, the time for appeal from the original appointment had run out. The distinction in the scope of the remedy is considered to be that all questions to which exceptions have been reserved may be raised on appeal and that a writ of error reaches only errors of law apparent on the record. The questions raised, however, by assignments of error 1 to 6 before the Supreme Court of the Territory were questions of law and not of fact.

Section 9564 referred to by appellees, and *Feary v. Santos,* 38 Haw. 240, also cited (appellees' brief, pages 20-21), apply to "any findings depending on the credibility of witnesses or the weight of the evidence or any alleged error in the omission or rejection of evidence."

The Supreme Court in its decision stated that the first six assignments of error would not be considered because

they were not made the subject of objection and exception at the time they were purportedly committed (R. 73). The question of whether these six errors injuriously affect substantial rights of the appellees on writ of error is a question of law. Section 9564 authorizes the Supreme Court to correct on writ of error any manifest error which injuriously affects substantial rights. As appellants read and interpret Section 9564 and *Feary v. Santos,* they have no application to questions of law apparent on the record.

While it is true that both Attorney Carlsmith and Attorney Cass stated at the hearing on the petition for the appointment of a guardian that they did not require any further evidence on the issue of competency, this statement could not constitute an acquiescence by Hattie Kulamanu Ward, through Lucy K. Ward, her next friend. Moreover, Lucy K. Ward on the return day of the verified motion offered to prove that her attorney disregarded her instructions.

Clearly, there was no acquiescence either on behalf of appellants Lucy K. Ward and Kathleen Ward as to the appointment of the Hawaiian Trust Company. Taking the record as a whole, it is difficult to see how appellees' contention that there was acquiescence in the appointment of the Hawaiian Trust Company can be seriously asserted.

**V. APPELLANTS' REPLY TO ARGUMENT UNDER POINT V OF APPELLEES' ANSWERING BRIEF (pp. 27-31).**

**LUCY K. WARD, AS NEXT FRIEND OF HATTIE KULAMANU WARD, WAS DENIED DUE PROCESS OF LAW AS A RESULT OF THE OBVIOUS BIAS AND PREJUDICE AGAINST HER MANIFESTED BY THE PROBATE JUDGE ON THE RETURN DAY TO THE HEARING ON HER VERIFIED MOTION.**

Appellants cannot agree with appellees that a hearing before an impartial judge is not one of the fundamental elements of due process of law.

In *National Labor Relations Board v. Ford,* (C.C.A. 6) 114 F. 2d 905, cert. den. 312 U.S. 689, the court said:

> We may accept as fundamental, the axiom that a trial by a biased judge is not in conformity with due process of law. Tumey v. Ohio, 273 U.S. 510, 522, 47 S. Ct. 437, 71 L. Ed. 749, 50 A.L.R. 1243; Jordan v. Massachusetts, 225 U.S. 167, 176, 32 S. Ct. 651, 56 L. Ed. 1038; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 294, 57 S. Ct. 724, 81 L. Ed. 1093.

If, as appellants believe, a hearing before a patently biased judge is not due process, a litigant taken by surprise at the hearing, as appellant Lucy K. Ward was, surely cannot be denied the right to raise the question. Appellees urge that as a matter of fact no personal bias was shown. The intemperate language of the probate judge towards Lucy K. Ward was not based on any evidence before him. Whatever the attitude of the court might have been towards counsel, and that too appears by the record to have been prejudiced, did not justify the probate judge in attacking the integrity of Lucy K. Ward.

It would seem as a matter of law that the assertion of the Supreme Court that appellant Lucy K. Ward had been given a full opportunity to present her contentions and had

been accorded due process of law, when she was denied any hearing on the merits, cannot be sustained. Indeed, it appears that a hearing on the merits would not, in all probability, have taken any longer than the court's lengthy castigation of Lucy K. Ward and her counsel.

## CONCLUSION

Appellants respectfully submit that the decision of the Supreme Court of the Territory of Hawaii, and the judgment and decree based thereon, should be reversed.

Dated: Honolulu, T. H., this 27th day of December, 1951.

Respectfully submitted,

BOUSLOG & SYMONDS

By.....
Harriet Bouslog

Attorneys for Appellants, Lucy K. Ward, Next Friend of Hattie Kulamanu Ward, and Lucy K. Ward and Kathleen Ward.

# APPENDIX I

# Appendix I

P. No. 15530

IN THE CIRCUIT COURT OF THE
FIRST JUDICIAL CIRCUIT
TERRITORY OF HAWAII

In the Matter of the Guardianship
of
HATTIE KULAMANU WARD,
An Incompetent person.

10:00 a.m. Session,
Thursday, December 20, 1951.

Present: HONORABLE CARRICK H. BUCK,
First Judge, Presiding,
O. SEZENEVSKY, Clerk

ANNE R. WHITMORE, Reporter

J. GARNER ANTHONY, ESQ., (Robertson, Castle & Anthony) Attorney for Petitioner;

MRS. HARRIET BOUSLOG, Attorney for Intervenors Miss Lucy K. Ward, and Miss V. Kathleen Ward;

W. Z. FAIRBANKS, ESQ., Guardian Ad Litem for Miss Hattie Kulamanu Ward.

**ORAL DECISION OF THE COURT**

THE COURT: The issue of the competency of Hattie Kulamanu Ward has been previously adjudicated by another division of this court, and is now being presented to

the Ninth Circuit Court of Appeals for determination, and although the petition herein raises the question of the competency of Hattie Kulamanu Ward, the gravamen of the petition is whether or not Hattie Kulamanu Ward is receiving proper care and attention at this time.

Upon the evidence adduced the Court finds that Hattie Kulamanu Ward is living in her girlhood home; that she is attended throughout the twenty-four hour period of each day and night by capable practical nurses and companions; that she is receiving, and has for a long period of time heretofore received, the best of physical care; and in addition thereto has been provided with amusements and pleasant outings; and, what is more important to the Court's mind, that such care has been and is now administered and supervised with affection by her sisters, Miss Lucy and Miss Kathleen Ward, whom the Court finds in all respects able and willing to continue such care. There does not appear on the evidence any reason to this Court why a guardian of the person should be appointed for Hattie Kulamanu Ward, and the prayer of the petition will be denied.

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I HEREBY CERTIFY that the foregoing is a true and correct transcript of the Oral Decision of the Court in the above entitled matter with respect to the hearing on Petition for the Appointment of a Guardian of the Person of Miss Hattie Kulamanu Ward before Honorable CARRICK H. BUCK, First Judge of the above entitled Court.

/s/ Anne R. Whitmore
Official Court Reporter

Honolulu, T. H.
December 20, 1951.